89-166

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IN RE LE PAPILLON, INC.,
IN RE YVES & PAUL, INC.,
IN RE AU CROISSANT, INC.,
YVES COURBOIS,

Petitioner,

v.

GANT REDMON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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July 31, 1989

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QUESTIONS PRESENTED

1. Whether a Bankruptcy Court's Failure to Determine the Reasonableness of Fee Requests Pursuant to Section 330(a) of the Bankruptcy Code Constitutes an Abuse of Discretion.

2. Whether Trustee's Fees and Attorney's Fees in Bankruptcy Proceedings May Be Settled By Private Agreement Among Parties in Interest.

PARTIES TO THE PROCEEDINGS

1. Yves P. Courbois, Petitioner, appeared as appellant below in appeal from the United States Bankruptcy Court for the District of Columbia to the United States District Court for the District of Columbia, and to the United States Court of Appeals for the District of Columbia Circuit. The Petitioner is President and sole shareholder of the debtor corporations.

2. Gant Redmon, Respondent, appeared as Appellee before the District Court and the Circuit Court below. The Respondent was trustee in bankruptcy for the debtor corporations.

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IN RE YVES & PAUL, INC.,
IN RE AU CROISSANT, INC.,
YVES COURBOIS,
Petitioner,
v.
GANT REDMON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Yves P. Courbois respectfully petitions for a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the District of Columbia Circuit entered February 23, 1989, request for rehearing denied May 2, 1989, in Appeal No. 88-7244. This case seeks review of the Bankruptcy Court's award of trustee's fees and attorney's fees to the respondent Gant Redmon and to Redmon Law Offices.

OPINIONS BELOW

A copy of the *Per Curiam* order of the United States Court of Appeals for the District of Columbia Circuit *In re Le Papillon, Inc., et al.*, No. 88-7244, appears in the Appendix (hereinafter referred to as "App. ——") at 1a-2a. A copy of the unreported decision and order of the United States District Court for the District

of Columbia, *In re Le Papillon, Inc., et al.*, No. 88-0062, appears at App. 5a-10a. A copy of the order entered by the United States Bankruptcy Court for the District of Columbia, *In re Le Papillon, Inc.*, No. 84-00158; *In re Yves & Paul, Inc.*, No. 84-00159; *In re Au Croissant, Inc.*, No. 84-00160, awarding fees to the former trustee in bankruptcy and to the trustee's attorneys, appears at App. 11a-13a.

JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit was entered February 23, 1989. A timely Motion for Rehearing and a Suggestion for Rehearing En Banc were denied on May 2, 1989. This Petition for Writ of Certiorari is being filed within 90 days of denial of rehearing pursuant to 28 U.S.C. sec. 2101(c) and Rules 20.2 and 20.4 of this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

Bankruptcy Code Section 330(a) (11 U.S.C. § 330(a))

§ 330. Compensation of officers.

(a) After notice and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, or to the debtor's attorney—

(1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and

(2) reimbursement for actual, necessary expenses.

The following statutory provisions are set forth in the appendix:

1. Bankruptcy Code sec. 326 (11 U.S.C. sec. 326), Limitation on compensation of trustee.

2. Bankruptcy Code sec. 327 (11 U.S.C. sec. 327), Employment of professional persons.

3. Bankruptcy Code sec. 328 (11 U.S.C. sec. 328), Limitation on compensation of professional persons.

4. Bankruptcy Code sec. 329 (11 U.S.C. sec. 329), Debtor's transactions with attorneys.

STATEMENT OF THE CASE

In March of 1983, the corporations Le Papillon, Inc.; Yves & Paul, Inc.; and Au Croissant, Inc. filed voluntary Chapter 11 petitions in the United States Bankruptcy Court for the District of Columbia. On October 10, 1985, the respondent Gant Redmon was named trustee in bankruptcy for the debtor corporations. Mr. Redmon's law firm, Redmon law Offices, was appointed to serve as attorneys for the debtor corporations. Mr. Redmon hired a full-time manager for the corporate businesses, which are two restaurants and a wholesale and retail bakery operation.

Mr. Redmon served as the trustee in bankruptcy from October 10, 1985 to June 1, 1987. At the time Mr. Redmon filed his first request for interim compensation, the petitioner Mr. Courbois filed objections to the fee requests for both the trustee and the trustee's law firm. A creditor also opposed the trustee's fee request on the grounds that the effort expended by the trustee did not warrant the fees requested, which the creditor claimed were so excessive as to jeopardize the debtors' chances of successful reorganization. The bankruptcy court approved

the first interim request without a hearing, and Mr. Courbois moved for reconsideration. The bankruptcy court declined to reconsider the fee award on the grounds that, *inter alia*, a hearing would be held by the court at the time of the final fee applications in the case, at which time the court would hear any objections to the trustee's requests for compensation. A motion for leave to appeal was denied by United States District Judge June Greene, citing the reasons stated by the bankruptcy court.

During the remainder of Mr. Redmon's term as trustee, each request for compensation to Mr. Redmon and his law firm was reviewed by Mr. Courbois and his attorney, and objections were duly noted for the record. In accordance with the bankruptcy court's announced intention not to hold a hearing on fee applications until the case was concluded, Mr. Courbois made no attempt to present any evidence to support his objections.

One of the objections noted by Mr. Courbois was that the trustee failed on numerous occasions to make employee withholding and F.I.C.A. deposits to the Internal Revenue Service; Mr. Courbois also advised the bankruptcy court that the fee applications for the trustee and his law firm improperly requested compensation for time spent dealing with the Service concerning tax deposits the trustee had failed to make. Additionally, Mr. Courbois objected to time billed by the trustee's law firm for activities which did not require the services of an attorney.

Plans of reorganization for all three corporations were approved by the bankruptcy court on June 1, 1987, at which time the trustee was relieved from his duties and the debtor restored to possession. The plans called for the corporations to retain the manager hired by the trustee. The plans also provided for payment, with interest, of some $158,000 in post-petition taxes not remitted to the Internal Revenue Service during the period of Mr. Redmon's trusteeship. All other creditors were to receive one

hundred percent payment of their claims, without interest.

On September 10, 1987, a hearing was held on the subject of the trustee's fee applications. The fee applications were originally opposed by both Mr. Courbois and Internal Revenue Service. In its brief filed with the bankruptcy court, the I.R.S. took the position that, as a consequence of the "unconscionable malfeasance" of Mr. Redmon as trustee, in failing to remit trust fund taxes as accrued, "no fees whatsoever should be permitted." At the time of the hearing, after some negotiation, Mr. Redmon agreed to reduce his fee request to a combined total of $157,500 compensation for all amounts then claimed as due to Mr. Redmon as trustee and to Redmon Law offices as the debtors' attorneys. Counsel for the Internal Revenue Service and Mr. Courbois agreed to withdraw their objections to the fee requests. The bankruptcy court then directed the debtors' bankruptcy counsel and the former trustee to prepare a consent order embodying the terms of the agreement.

A consent order was prepared and circulated by the trustee to the debtors' bankruptcy counsel and to counsel for the Internal Revenue Service for signature. Before the consent order reached Mr. Courbois' attorney for signature, events transpired which caused Mr. Courbois to resume his objections to Mr. Redmon's claim for compensation.

On September 14, four days after the hearing on the trustee's fee applications, the manager who had been hired by the trustee abruptly and without prior notice terminated his employment with the debtor corporations. A subsequent investigation of the corporate books and records which had been maintained by the manager and his administrative assistant revealed, *inter alia*, a deficit in the corporate checkbook of approximately $100,000; several notices from the Internal Revenue Service for checks returned for insufficient funds, for postpetition

tax periods not included in the plans of reorganization; notice of unpaid sales taxes from the District of Columbia; and cancellation of all insurance for the three corporations and their businesses, for lack of payment to the insurance broker going back as far as 1986.

By the time they were advised of the situation, the debtors' bankruptcy counsel and counsel for the I.R.S. had already signed the consent order awarding Mr. Redmon $157,500 in fees. Counsel for Mr. Courbois advised the bankruptcy court that, due to the serious tax deficiencies of which his client was unaware at the time of the hearing, counsel for Mr. Courbois would not sign the order. The debtor's bankruptcy counsel advised the court that "the agreement of the Internal Revenue Service to the compromise contained in the [consent order] was obtained on the strength of representations which undersigned counsel now knows to be false," and requested that the bankruptcy court "set down a status hearing to determine how the parties should proceed on on the basis of these facts."

Without further comment or inquiry, the consent order was entered by the bankruptcy court on December 2, 1987.

On appeal to the United States District Court for the District of Columbia, Mr. Courbois urged that the Bankruptcy Court had a duty to review the award in light of the provisions of Section 330 of the Bankruptcy Code, and that its failure to determine the reasonableness of the award, notwithstanding the withdrawal of objections, constituted an abuse of discretion. He further urged that even a cursory review of the applications would demonstrate that the fees awarded to Mr. Redmon as trustee constituted an enhancement of his usual and customary fees as an attorney, and did not comport with the reasonableness requirements of Section 330.

The district court ruled (*see* App. 5a-10a) that Mr. Courbois' agreement to withdraw his objections to the

trustee's fee requests constituted a settlement binding on the parties; that the law, "necessarily including bankruptcy law" (App. 9a), favors settlement; and that events subsequent to September 10 did not justify setting aside the settlement. The district court further held that Mr. Courbois' appeal was without merit, but declined to impose sanctions as requested by the respondent Mr. Redmon.

Mr. Courbois noted a timely appeal to the Circuit Court of Appeals for the District of Columbia Circuit. Mr. Redmon moved for summary affirmance. On February 23, 1989, the circuit court granted Mr. Redmon's motion for summary affirmance (*see* App. 1a-2a) "substantially for the reasons stated by the district court" (App. 1a); the circuit court also ordered Mr. Courbois and his attorney to pay Mr. Redmon's costs and fees on appeal for "continu[ing] to mount meritless attacks against a valid settlement agreement" and wast[ing] judicial resources by making frivolous arguments." (App. 2a)

A timely motion for rehearing and suggestion for rehearing *en banc* were denied by the circuit court on May 2, 1989. (App. 3a, 4a)

Subsequent to the circuit court's summary affirmance, the former trustee Mr. Redmon moved to convert the corporations' Chapter 11 proceedings to Chapter 7. After an evidentiary hearing, that motion was denied by the bankruptcy court on March 29, 1989. The bankruptcy court's memorandum of decision and order denying the motion to convert appear at App. 14a-17a.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted to Settle Whether a Bankruptcy Court's Failure to Determine the Reasonableness of Fee Requests Pursuant to Section 330(a) of the Bankruptcy Code Constitutes an Abuse of Discretion.

Section 330(a) of the Bankruptcy Code, 11 U.S.C. § 330, authorizes compensation for services and reimbursement of expenses to officers of the bankruptcy estate and other professionals. Section 328 of the Code (11 U.S.C. § 328) sets limits on the compensation of professional persons and, together with section 329 (11 U.S.C. § 329), authorize the bankruptcy court to award fees to attorneys and professional persons on terms different than contracted for with the debtor or the trustee, where such compensation is unreasonable or the agreement otherwise turns out to have been improvident. Section 327 (11 U.S.C. § 327) authorizes the trustee to hire professional persons to assist him in administration of the estate. Section 326 (11 U.S.C. § 326) sets limits on the compensation of the trustee.

A. *The order of the District of Columbia Circuit sanctions a holding of the district court so far departed from the accepted and usual course of judicial proceedings in bankruptcy cases as to call for an exercise of this Court's powers of supervision.*

It is a well established principle of bankruptcy law that a bankruptcy court has an independent duty to review requests for trustee's fees and attorney's fees, even in the absence of objections to the fee applications. Federal bankruptcy courts from all other circuits have applied this principle; *see, e.g.*:

First Circuit. *In re Thomas*, 43 B.R. 510, 511 (Bkrtcy. D.Mass 1984) ("[T]his Court has an duty independent of any objection to determine the reasonableness of the amounts requested.").

Second Circuit. *In re Cuisine Magazine, Inc.*, 61 B.R. 210, 219 (Bkrtcy. S.D.N.Y. 1986):

> Regardless of the absence of any objections to a fee request by a party in interest, it is still incumbent upon the bankruptcy court to conduct its own independent analysis of all applications for compensation.

Third Circuit. *In re J.A. & L.C. Brown Co., Inc.*, 71 B.R. 197, 198 (Bkrtcy.E.D.Pa. 1987) (duty to determine reasonableness of fee requests "even without objections"); *Matter of Affinito & Sons*, 63 B.R. 495, 497 (Bkrtcy. W.D.Pa. 1986) ("independent duty and responsibility").

Fourth Circuit. *In re B&W Tractor Co., Inc.*, 38 B.R. 613, 616-617 (Bkrtcy.E.D.N.C. 1984) ("request for administrative expenses not 'deemed allowed' in the absence of an objection").

Fifth Circuit. *In re NRG Resources, Inc.*, 64 B.R. 643, 650 (W.D.La. 1986) ("bankruptcy court has an independent duty" to determine reasonableness of fee requests).

Sixth Circuit. *Matter of Baldwin-United Corp.*, 79 B.R. 321, 323 (Bkrtcy.S.D.Ohio 1987):

> [T]he Code contemplates that the Court will perform an independent review of fees requested by professionals in order to determine whether they are reasonable and whether the services performed and expenses incurred were actual and necessary. . . . Judicial scrutiny is required whether or not objections to fee requests are filed.

See also In re Kentucky Threaded Products, Inc., 49 B.R. 118, 120 (Bkrtcy.W.D.Ky. 1985) ("The lack of an objection . . . does not affect the Court's duty to fix reasonable compensation"); *Matter of Darke*, 18 B.R. 510, 514 (Bktcy.E.D.Mich. 1982) ("court has duty regardless of

whether or not objections are filed to determine whether compensation for . . . services is or is not reasonable").

Seventh Cricuit. *In re Pettibone Corp.*, 74 B.R. 293 (Bkrtcy.N.D.Ill.1987) ("Even if no party in interest objects . . . the court should review the application to make sure the compensation sought has been earned and is reasonable"); *In re Wildman*, 72 B.R. 700, 705 (Bkrtcy. N.D.Ill. 1987) ("bankruptcy judge has a duty to challenge requested fees *sua sponte*"):

> Clearly, the bankruptcy judge has the broadest discretion to review and question applications for compensation. Indeed, he has the inescapable statutory responsibility to do so.

Eighth Circuit. *In re S. Garrott & Sons*, 54 B.R. 221 (Bkrtcy. E.D.Ark. 1985) ("independent authority and responsibility to investigate reasonableness of compensation"); *Matter of Pothoven*, 84 B.R. 579, 583 (Bkrtcy. S.D. Iowa 1988):

> It is well established that a bankruptcy court has the independent authority and responsibility to determine the reasonableness of all fee requests, regardless of whether objections are filed.

Ninth Circuit. *In re Esar Ventures*, 62 B.R. 204, 205 (Bkrtcy.D.Hawaii 1986) ("duty to examine reasonableness of all fees even if there is no objection.").

Tenth Circuit. *In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557 (Bkrtcy. D. Utah 1985) (duty regardless of objections).

Eleventh Circuit. *Matter of Ross*, 88 B.R. 471, 474 (Bkrtcy. M.D.Ga. 1988):

> Case law firmly establishes that the bankruptcy court has an affirmative obligation to evaluate the reasonableness of compensation to professional persons independent of any objection by a party in interest.

II. Certiorari Should Be Granted to Decide Whether Trustee's Fees and Attorney's Fees in Bankruptcy Proceedings May Be Settled By Private Agreement Among Parties in Interest.

The order of the Court of Appeals for the District of Columbia Circuit, affirming the district court's decision that trustee's fees and attorney's fees in a bankruptcy proceeding may be settled by private agreement, presents an important question of bankruptcy law which has not been but should be settled by this Court.

A. *The District of Columbia Circuit is in direct conflict with holdings of the Fifth Circuit and the Second Circuit regarding settlement of trustee's fees and attorney's fees in bankruptcy cases.*

The United States Court of Appeals for the Fifth Circuit has consistently held that determination of fees for officers of the bankruptcy estate is a duty of the bankruptcy court which is not within the contractual power of the bankrupt. In *Kolb v. Berlin*, 356 F.2d 269 (5th Cir. 1966), the Fifth Circuit held that

> once the bankruptcy petition is filed, the award of an attorney's fee is a responsibility of the Court which cannot be exercised by the bankrupt.

More recently, reviewing the case of *In re Hudson Shipbuilders, Inc.*, 794 F.2d 1051 (5th Cir. 1986), the Fifth Circuit rejected the notion that professional fees contracted or agreed upon by parties in interest were not subject to the bankruptcy court's review. The circuit court declared:

> We reject the appellant's casual characterization of the issue as merely involving a private negotiation in which the bankruptcy court had no interest. Once Hudson filed its petition for relief under Chapter 11, the entire estate of the debtor became subject to the

> jurisdiction of the bankruptcy court and the provisions of the Bankruptcy Code.

Id. at 1055.

Also in 1986, the Fifth Circuit affirmed a decision of the Bankruptcy Court for the Northern District of Texas, rejecting contractual fee agreements of parties in interest which did not comport with the reasonableness requirements of the applicable provisions of the Bankruptcy Code. In *In re Consolidated Bancshares, Inc.*, 49 B.R. 467 (Bkrtcy. N.D.Tex. 1985), *affirmed in part, vacated and remanded in part on other grounds sub nom. Matter of Consolidated Bancshares, Inc.*, 785 F.2d 1249 (5th Cir. 1986), the bankruptcy court rejected a request for payment to an attorney based on a contingency fee agreement, stating: "[T]his Court is not bound by any contingent fee arrangement which the parties have agreed to among themselves." While noting that there is nothing inherently wrong with contingency fee agreements in a bankruptcy context, the bankruptcy court nevertheless declared:

> Section 330 (a)(1) [of the Bankruptcy Code] clearly restricts a fee award to only "reasonable compensation for *actual, necessary* services.

Id., 49 B.R. at 474 (Citations omitted; emphasis in original). Affirming, the Fifth Circuit held that

> the fact that the debtor's counsel made an agreement with the debtor to obtain . . . a contingency does not require the bankruptcy court to approve it . . .

785 F.2d at 1257.

The principle that professional fees in bankruptcy proceedings are not a matter for purely private agreement flows naturally from the bankruptcy court's statutory duty to review fee requests for reasonableness, and has therefore been espoused by many lower courts outside the Fifth Circuit. *See, e.g., In re Erwhon, Inc.*, 21 B.R. 79, 80

(Bkrtcy. Mass 1984) ("In a bankruptcy matter, fees are not a matter for purely private agreement."); *In re Harman Supermarket, Inc.*, 44 B.R. 918, 921 (Bkrtcy. W.D. Va. 1984):

> As between attorney and client, the fee is a contractual matter between the two parties. Such a fee may be subject to variation where a reasonable standard is applied . . .

See also, Cohen & Thiros v. Keen Enterprises, 44 B.R. 570, 572 (N.D. Ind. 1984):

> In bankruptcy cases, fees are not a matter for purely private agreement between the debtor and his attorney because every dollar paid to the debtor's attorney correspondingly depletes the fund to creditors.

Accord., In re Athos Steel and Aluminum, Inc., 69 B.R. 515, 521 (Bkrtcy. E.D.Pa. 1987).

The United States Circuit Court of Appeals for the Second Circuit is in agreement with this principle. Reviewing the railroad reorganization case *Matter of New York, New Haven and Hartford Railroad Company*, 632 F.2d 955 (2d Cir. 1980), that court observed:

> Normally courts are loathe to investigate the merits of the controversy underlying a compromise. In the case of a section 77 reorganization, however, it is clearly the duty of the reviewing court to make an independent determination on whether the plan is "fair and equitable" as required by section 77(e) of the Bankruptcy Act, even if the plan is the result of a compromise. . . . That a large majority of the creditors have voted to approve of the plan, as here, does not relieve the court of its responsibility.

Id. at 960 (footnotes omitted), citing *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.*, 390 U.S. 414, 424, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968) and *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 114, 60 S.Ct. 1, 84 L.Ed. 110 (1939).

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari from the United States Court of appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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July 31, 1989

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7244

IN RE: LE PAPILLON, INC.,
d/b/a AU PIED DE COCHON, *et al.*

YVES COURBOIS,
Appellant

Before: MIKVA, RUTH B. GINSBURG and SILBERMAN,
Circuit Judges

ORDER

[Filed Feb. 23, 1989]

Upon consideration of the motion for stay pending appeal and the response, the motion for summary affirmance, the response and reply, it is

ORDERED that the motion for summary affirmance be granted substantially for the reasons stated by the district court in its Memorandum Order filed October 7, 1988. It is

FURTHER ORDERED that appellee's costs and counsel fees reasonably incurred on appeal be borne jointly and severally by appellant and attorney for appellant. *See* 28 U.S.C. §§ 1912, 1927; Fed. R. App. P. 38; *American Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056 (D.C. Cir. 1986) (where client and counsel who advanced frivolous argument for him, multiply proceedings unreason-

ably and vexatiously, they may be held accountable for expenses and attorney's fees incurred on appeal). Appellant has continued to mount meritless attacks against a valid settlement agreement. Appellee has not received any part of his fee. Appellant has wasted judicial resources by making frivolous arguments. The parties shall attempt to agree on the fee. If they are unable to reach an agreement, appellee shall submit to the court, within thirty days of the date of this order, a statement reflecting the hours spent on this appeal and counsel's rate. Appellant may respond to that statement within ten days. It is

FURTHER ORDERED that the motion for stay be dismissed as moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7244

IN RE: LE PAPILLON, INC.,
d/b/a AU PIED DE COHON

YVES & PAUL, INC.
d/b/a AUX FRUITS DE MER,
Appellant

Before: MIKVA, RUTH B. GINSBURG and SILBERMAN,
Circuit Judges

ORDER

[Filed May 2, 1989]

Upon consideration of appellant's petition for rehearing directed to the panel and appellant's Motion to Take Judicial Notice, it is

ORDERED, by the Court, that the motion to take judicial notice is denied and it is

FURTHER ORDERED, by the Court, that the petition for rehearing is denied.

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7244

IN RE: LE PAPILLON, INC.,
d/b/a AU PIED DE COCHON

YVES & PAUL, INC.
d/b/a AUX FRUITS DE MER,
Appellant

Before: WALD, *Chief Judge*; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG and SENTELLE, *Circuit Judges*

ORDER

[Filed May 2, 1989]

Appellant's Suggestion For Rehearing *En Banc* and Motion To Take Judicial Notice have been circulated to the full Court. Upon consideration thereof it is

ORDERED, by the Court, *en banc*, that the motion to take judicial notice is denied and, no judge of the Court having requested the taking of a vote thereon, it is

FURTHER ORDERED, by the Court *en banc*, that appellant's suggestion is denied.

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-0062-LFO

IN RE: LE PAPILLION, INC.
YVES & PAUL, INC.
AU CROISSANT, INC.

ORDER

[Filed Oct. 7, 1988]

This is an appeal from orders of the Bankruptcy Judge awarding fees and reimbursement for expenses to the Trustee for his services as Trustee and for legal services in this case. Appellant raises procedural and substantive issues.

As to procedure, appellant complains that he was not afforded a hearing on his objections to the awards sought by the Trustee. However, the record indicates that on numerous occasions in 1986, the Bankruptcy Court entertained and acted on applications by the Trustee for interim fee awards. An Appendix filed by appellee records three filings by or on behalf of appellant in opposition to these applications.

In January 1987, the debtor corporations had resumed possession of the formal bankrupt estates. In June 1987, the Trustee applied for a final award. On July 21, 1987, the debtor corporations, by their counsel, and Yves Courbois, as president and sole shareholder of the debtor corporations by his separate counsel, filed objections to the Trustee's application for final payment. Appendix at 28, 31. Neither objection stated any specific objection

to the application. The Courbois' filing requested a hearing.

On August 18, 1987, the Bankruptcy Judge scheduled for September 8, 1987, a hearing on "Application for Approval of Payment of Counsel's Fees and Costs and Trustee's Fees and Objections filed thereto by" Courbois, the debtor corporations, and the Internal Revenue Service.

Neither Courbois nor his counsel appeared on September 8, 1987. The record indicates that Courbois' counsel, Mr. Schwatzbach, was on vacation. Appendix at 60-61. Nevertheless, those present led by Mr. Seeber, counsel for corporate debtor (now back in possession), came close to negotiating a settlement. The proceeding was adjourned until September 10, 1987, so that Courbois' counsel could be present. Appendix at 61-63. Courbois and his counsel did, in fact, appear at the September 10 hearing. Appendix at 80. At that time counsel were completely free to conduct an evidentiary hearing. They requested none. Instead, a settlement was worked out, virtually in the presence of the Bankruptcy Court.

After encouragement from the Bankruptcy Judge, the parties present in court, including Courbois and his counsel, resumed the settlement negotiations which had nearly been concluded on September 8, including particularly compensation for the Trustee. After several recesses for telephone conferences between counsel present in court and clients who were elsewhere, Mr. Seeber announced a settlement, including particularly a settlement of appellee's claims for fees. Appendex at 83, 84. Following this announcement, Mr. Seeber stated on the record:

> And I would further state that Mr. Corboi [sic], individually, who was an objector is here in the courtroom with counsel and subscribes to that resolution.

Appendix at 85. To this, Courbois' counsel responded, also in open court,

> Your Honor, Mr. Seeber certainly has correctly set forth our agreement. We are, obviously, happy we could get the matter resolved.

Appendix at 86. Finally, the following colloquy occurred between the court and appellant's counsel:

> THE COURT: Very well. Now, Mr. Schwartzback [sic], could you address the Court?
>
> MR. SCWARTZBACK [sic]: Certainly, Your Honor.
>
> THE COURT: You have heard what Mr. Seeber and Mr. Gordon and Mr. Redmon had to say. Do you wish to add anything?
>
> MR. SCHWARTZBACK [sic]: I wish to add nothing, Your Honor.
>
> THE COURT: So their statements accurately represent your understanding of the agreements that have been made?
>
> MR. SCHWARTZBACK [sic]: They do.
>
> THE COURT: Thank you.
>
> MR. SCHWARTZBACK [sic]: Thank you.
>
> THE COURT: Mr. Early, do you wish to be heard?
>
> MR. EARLY: No, Your Honor.
>
> THE COURT: Now, Mr. Corboi [sic], you have heard what has been said. Do you understand?
>
> MR. CORBOI [sic]: Yes, I do.
>
> THE COURT: This is your agreement as well as the agreement of the three corporations?
>
> MR. SCHWARTZBACK [sic]: Well, I don't know that it is his agreement, now, Your Honor. He objects. He objected to the trustee's fees which is assessable to the corporations.
>
> THE COURT: Well, is he withdrawing his objection? Is he, as part of this agreement, withdrawing his objection?

MR. SCHWARTZBACK [sic]: I thought I made that clear when I addressed the Court and said that I, on behalf of Mr. Corboi [sic], restate what counsel has already told the Court.

THE COURT: I see. Very well. That was the only sense that I meant when I was asking Mr. Corboi [sic], was this his agreement.

MR. SCHWARTZBACK [sic]: I just don't want —

THE COURT: Does he understand that this is the agreement that had been reached and is he going to abide by it?

MR. SCHWARTZBACK [sic]: Well, I think that is the corporations abiding by it, Your Honor, within the plan itself. This is not Mr. Corboi's [sic] personal obligation.

THE COURT: I understand that, Mr. Schwartzback [sic]. I don't want to get into all of this debate through an argument with you. But I simply want to clarify that Mr. Corboi [sic] understands that he is withdrawing his objection to Mr. Redmon's claim in so far as that is reflected in the agreement that has been stated in open court.

MR. SCHWARTZBACK [sic]: And that is your understanding and agreement, is it not, Mr. Corboi [sic], as the Judge has presented it?

MR. CORBOI [sic]: Yes, it is

MR. SCHWARTZBACK [sic]: Yes, it is, Your Honor.

THE COURT: Wonderful. I am glad to know that we are all in agreement in so far as the agreement has been reached, as stated in open court, and I hope that the Internal Revenue Service and the three corporations and Mr. Corboi [sic] and Mr. Redmon and all are able to resolve the remaining

differences related to the funds that may be payable to the Internal Revenue Service as well.

Thank you all.

Appendix at 89-91.

Despite the foregoing commitment, Courbois through his counsel subsequently refused to sign a proposed order that would have executed the open court agreement. Claiming discovery of tax deficiencies after agreement to the settlement, Courbois's counsel served an opposition to it. On November 30, 1988, after considering these objections, the Bankruptcy Judge entered an order that awarded to appellee fees that were less than those agreed upon at the settlement, but acceptable to appellee. Appendix at 101-02. It is apparent from the face of the foregoing record that Courbois had ample opportunity to present his objections to the Bankruptcy Judge and exercised those opportunities by filing objections to applications for interim and final payments, and by pleadings and letters to the Bankruptcy Judge. The absence of Courbois and his counsel from the September 8 hearing is best explained by the fact that the latter was on vacation at the time. Moreover, both were present at the September 10 hearing. For ought that appears Courbois and counsel could have presented evidence. They chose not to do so. Rather they joined ongoing settlement negotiations that were consummated by a settlement literally on the record in open court. Courbois and his counsel have had all of the hearing and opportunity for advocacy to which they are entitled.

As to the substantive claim: a settlement is a settlement. The law, necessarily including bankruptcy law, favors settlement. *See, i.e., American Sec. VanLines v. Gallagher*, 782 F.2d 1056, 1060-63 (D.C. Cir. 1986). There is no allegation or proffered evidence of fraud in the inducement of the settlement. Appellant's claim that events subsequent to the settlement justified reneging on

it are completely without merit. In any event the post-settlement events were not demonstrably unforeseen at the time of settlement.

Appellee seeks an award to compensate him for attorneys' fees and costs incurred in his successful opposition of this appeal. While the appeal is without merit and appellant may well have abused the process of the Bankruptcy Court, appellee did not seek sanctions there. Nor should sanctions be imposed now merely because he exercised his right to appeal to this Court. It would be inappropriate to chill access to District Court review of the necessarily controversial rulings of the Bankruptcy Court.

Accordingly, the orders of the Bankruptcy Court awarding fees and costs to appellee are AFFIRMED. The application for sanctions is DENIED.

IT IS SO ORDERED.

/s/ Louis F. Oberdorfer
LOUIS F. OBERDORFER
United States District Judge

Date: October 5, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Martin L. Bloom, Clerk
U.S. Bankruptcy Court for D.C.

IN RE:

Case No. 84-00158

LE PAPILLON, INC.
d/b/a AU PIED DE COCHON

Case No. 84-00159

YVES & PAUL, INC.
d/b/a AUX FRUITS DE MER

Case No. 84-00160

AU CROISSANT, INC.
d/b/a AU CROISSANT CHAUD

Debtors.

ORDER AWARDING TRUSTEE'S COMMISSIONS, COMPENSATION FOR ATTORNEYS FOR TRUSTEE, AND REIMBURSEMENT OF EXPENSES

[Filed Dec. 2, 1987]

At WASHINGTON, D.C., this 30th day of November, 1987:

This matter came on upon the Application of GANT REDMON for Trustee's Commissions, for approval of attorneys' fees payable to Redmon Law Offices and for reimbursement of expenses, and upon the objections thereto filed by the Internal Revenue Service, the debtors, and Yves Courbois, president of the debtors, and the parties having appeared before the Court at a hearing

thereon, and it appearing that all creditors have been given notice of the fee application, and that no other objections were filed, and the United States Trustee having consented to the said applications, and the objecting parties in interest having agreed to resolve their differences, and it further appearing that the Trustee and his attorneys provided valuable legal services which benefitted the estate by aiding in the resolution of the many disputes which have been the hallmark of these proceedings, and the Court having been fully advised, IT IS

ORDERED: That GANT REDMON is hereby awarded the sum of One Hundred Fifty-seven Thousand Five Hundred Dollars ($157,500.00) for Trustees' commission, and payment in full of the application of Redmon Law Offices for attorney's fees and for reimbursement of expenses; said sum shall be payable Seven Thousand Five Hundred Dollars ($7,500.00) on or before October 1, 1987, plus monthly payments of Two Thousand Five Hundred Dollars ($2,500.00) beginning November 1, 1987, and continuing for sixty (60) months, on the first of each month. These payments provide a total award of One Hundred Fifty-seven Thousand Five Hundred Dollars ($157,500.00) for any and all obligations of all three estates to Mr. Redmon and his law firm in any capacity whatsoever; and it is further,

ORDERED: That, although these matters have not been consolidated, because of the interrelationship among the three estates and the common benefit derived from the performance of the tasks enumerated in the applications, orders shall be entered in all three proceedings identical to the within Order, but the total compensation of One Hundred Fifty-seven Thousand Five Hundred Dollars ($157,500.00) reflects the award overall, and not in each particular case.

/s/ George Bason Jr.
GEORGE FRANCIS BASON, JR.,
United States Bankruptcy Judge

CONSENTED AND AGREED TO:

/s/ Brian R. Seeber
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(202) 785-9123
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/s/ Gant Redmon
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Trustee and Counsel for Trustee

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/s/ Robert L. Gordon
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(202) 724-6438
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 84-158
Case No. 84-159
Case No. 84-160

Chapter 11

IN RE: LE PAPILLION, INC.
YVES & PAUL, INC.
AU CROISSANT, INC.

Debtors

MEMORANDUM OF DECISION

[Filed March 29, 1989]

These cases came before the court upon the motion of Gant Redmon, the former Chapter 11 trustee of the three debtors in possession, to convert all three cases to cases under Chapter 7. Heretofore by this court (Bason, J.), an order had been entered confirming the plans proposed for reorganization. The instant motion is opposed by the United States of America (Docket Entry 388), by a group of unsecured creditors, and by the debtors. The gravamen of the movant's motion is that he is not being paid out his trustee's fees as promised under the plan.

These jointly-administered cases were assigned to the undersigned because of the recusal of the Honorable S. Martin Teel, Jr., Judge of the United States Bankruptcy Court for the District of Columbia. Judge Teel had appeared in these cases on behalf of a creditor, the Internal Revenue Service, and was thereby disqualified.

In preparation for the hearing, the court reviewed the most recent part of these files and noted that during the course of the trusteeship of the movant, at the time when the restaurants were being managed by an individual under his supervision, there was a failure to pay trust fund and other taxes in an amount in excess of $158,000. Were the court to grant this motion, the movant would find himself in the position, after these cases were converted, the restaurants closed, and the furniture and fixtures liquidated, of being personally responsible for the repayment of taxes due in the course of his trusteeship that he had failed to pay.

Furthermore, the court understands that in the course of his trusteeship the movant supplied his manager with a rubber stamp for the purpose of affixing the trustee's signature to checks drawn on the debtors' accounts. From the record before this court, it appears that the trustee compounded the negligence by failing to be the individual who reviewed the statements of account when these were returned from the bank. Such a review would have shown that, while checks were written to the Internal Revenue Service on the trustee's account, these checks were returned for insufficient funds. A review would have spared the former trustee from the claim of gross negligence made by the Internal Revenue Service (Docket Entry 388) and would have avoided the apparent discrepancies between the IRS exhibits to that pleading and the trustee's accounting of receipts and disbursements (Docket Entry 427).

Finally, despite this unaceptable conduct, the trustee appears to have requested the absolute maximum compensation alowed under 11 U.S.C. § 326(a). It is puzzling that his recent reports appear to show the amount of restaurant sales and not the statutory measure of monies disbursed or turned over by the trustee to parties in interest. This is illustrated by one of the last reports by the trustee requesting compensation of $13,000 based on sales

for approximately ten hours work (Docket Entry 381).[1] As was pointed out by the district court on appeal in the case of *In re Roco Corp.*, 64 B.R. 499 (D. R.I. 1966), it was proper for the bankruptcy court to cut into this maximum award and to treat a petition for trustee's fees with conservatism.

As to the matter at hand, the court finds that while payments under the plan to Mr. Redmon are not moving as fast as promised, movant has not demonstrated the inability of debtors to effectuate substantial consummation, 11 U.S.C. § 1112(b)(7), or a material default thereunder, 11 U.S.C. § 1112(b)(8).

An order will be entered in accordance with the foregoing.

DATE: March 29, 1989

/s/ Paul Mannes
PAUL MANNES, Judge
United States Bankruptcy Court
for the District of Columbia
(Sitting by Designation)

cc: Saul Schwartzbach, Esq.
Brian Seeber, Esq.
Robert Coulter, Esq.
Steven Paleos, Esq.
Dennis Early, Esq.

Copies mailed to parties 3/29/89

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[1] This court believes that a 3% level of compensation to the trustee in a business operated by a full-time manager is excessive.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

CONSOLIDATED
Case No. 84-158
Case No. 84-159
Case No. 84-160

Chapter 11

IN RE: LE PAPILLION, INC.
YVES & PAUL, INC.
AU CROISSANT, INC.

Debtors

ORDER DENYING MOTION TO CONVERT

[Filed April 3, 1989]

Upon consideration of the motion of Gant Redmon, former Chapter 11 trustee, to convert the above three cases to cases under Chapter 7, the court having stated its findings and conclusions in open court and having supplemented the same by memorandum submitted this day, it is this 29th day of March, 1989, by the United States Bankruptcy Court for the District of Columbia,

That the motion is denied.

/s/ Paul Mannes
PAUL MANNES, Judge
United States Bankruptcy Court
for the District of Columbia
(Sitting by Designation)

cc: Saul Schwartzbach, Esq.
Brian Seeber, Esq.
Robert Coulter, Esq.
Steven Paleos, Esq.
Dennis Early, Esq.

BANKRUPTCY CODE SECTION 326

(11 U.S.C. § 326)

§ 326. Limitation on compensation of trustee.

(a) In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed fifteen percent on the first $1,000 or less, six percent on any amount in excess of $1,000 but not in excess of $3,000, and three percent on any amount in excess of $3,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

(b) In a case under chapter 13 of this title, the court may not allow compensation for services or reimbursement of expenses of a standing trustee appointed under section 1302(d) of this title, but may allow reasonable compensation under section 330 of this title of a trustee appointed under section 1302(a) of this title for the trustee's services, payable after the trustee renders such services, not to exceed five percent upon all payments under the plan.

(c) If more than one person serves as trustee in the case, the aggregate compensation of such persons for such service may not exceed the maximum compensation prescribed for a single trustee by subsection (a) or (b) of this section, as the case may be.

(d) The court may deny allowance of compensation for services or reimbursement of expenses of the trustee if the trustee failed to make diligent inquiry into facts that would permit denial of allowance under section 328(c) of this title or, with knowledge of such facts, employed a professional person under section 327 of this title.

BANKRUPTCY CODE SECTION 327

(11 U.S.C. § 327)

§ 327. Employment of professional persons.

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under section 721 or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7 or 11 or this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

BANKRUPTCY CODE SECTION 328

(11 U.S.C. § 328)

§ 328. Limitation on compensation of professional persons.

(a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions ,the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

(b) If the court has authorized a trustee to serve as an attorney or accountant for the estate under section 327(d) of this title, the court may allow compensation for the trustee's services as such attorney or accountant only to the extent that the trustee performed services as attorney or account for the estate and not for performance of any of the trustee's duties that are generally performed by a trustee without the assistance of an attorney or accountant for the estate.

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

BANKRUPTCY CODE SECTION 329

(11 U.S.C. § 329)

§ 329. Debtor's transactions with attorneys.

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of and in connection with the case by such attorney, or the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to—

(1) the estate, if the property transferred—

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11 or 13 of this title; or

(2) the entity that made such payment.

No. 89-166

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

IN RE: LE PAPILLON, INC.,
IN RE: YVES & PAUL, INC.,
IN RE: AU CROISSANT, INC.,

YVES COURBOIS,
Petitioner,

v.

GANT REDMON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

W. STEVEN PALEOS *
REDMON LAW OFFICES
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(703) 549-4800
Counsel for Respondent

* Counsel of Record

August 28, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a bankruptcy court's fee award should be overturned where, during the hearing on the fee, the judge overseeing the case found that the trustee had done an "outstanding job" and achieved a "remarkable turnaround;" where no party presented any evidence to substantiate any material negative allegations despite several opportunities to do so; where all parties were represented by experienced attorneys who negotiated a lower compromised fee; and where that lower, compromised fee fell within the reasonable range of litigation possibilities.

2. Whether the petitioner is estopped from appealing a settlement order where all alleged post-settlement revelations were known uncertainties more easily investigated by the petitioner than by the respondent.

3. Whether this Court should award attorney's fees and costs against the petitioner due to the frivolous, unsupported nature of this appeal, given the fact that the District Court found the initial appeal from the bankruptcy court to be "without merit" and especially where the District of Columbia Circuit awarded fees after finding, as a matter of fact, that this challenge was a "meritless" attack against a "valid settlement agreement."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-166

IN RE: LE PAPILLON, INC.,
IN RE: YVES & PAUL, INC.,
IN RE: AU CROISSANT, INC.,

YVES COURBOIS,

Petitioner,

v.

GANT REDMON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Gant Redmon, hereby opposes the Petition for Writ of Certiorari. The petition is frivolous and, in addition to seeking its denial, Mr. Redmon seeks attorneys fees and double costs against the petitioner and his counsel. The Honorable United States District Judge Louis F. Oberdorfer found the appeal to the district court to be "without merit" and the United States Court of Appeals for the District of Columbia Circuit awarded

fees against Courbois and his counsel on appeal to that court finding that appeal to be a "meritless attack[] againt a valid settlement agreement."

OPINIONS BELOW

Mr. Redmon supplements the orders reproduced in petitioner's appendix ("App. ——") by reproducing in respondent's appendix ("R.App. ——") the bankruptcy court's finding of fact that alleged post settlement revelations were known uncertainties at the time of settlement. R.App. 1a.

In addition, certain factual findings made from the bench are also reproduced in the respondent's appendix. The factual finding made by the Honorable George Francis Bason, Jr., during the second day of hearings on Mr. Redmon's final fee application, that Mr. Redmon had done an "outstanding job" and was responsible for the "remarkable turnaround" experienced by the debtors is reproduced at R.App. 3a. The factual findings made by the Honorable Aubrey E. Robinson, Jr., Chief Judge, United States District Court for the District of Columbia, sitting as a bankruptcy judge, that, contrary to repeated denials by counsel for petitioner, petitioner and his counsel had in fact entered into a settlement agreement; that challenging the settlement agreement was "wasting judicial time;" and that the petitioner and his counsel were acting disingenuously, are to be found at R.App. 4a-9a.

Also included is the Order of February 20, 1987, wherein Judge Bason found that Courbois had forgone his opportunity for an oral hearing and had acquiesced to a paper hearing on interim fee applications. R.App. 10a-11a.

The Order of August 18, 1987, which set the commencement of the hearing of the final award of the fees as September 8, 1989, is found at R.App. 12a.

The bench ruling continuing the September 8, 1987 hearing to September 10, 1987 so that Mr. Schwartzbach could attend is included as R.App. 14a.

Also included is the Order of Confirmation Of Amended Plan Of Reorganization *In re: Le Papillon, Inc.*, No. 85-158, which relieved Mr. Redmon of his duties as Trustee on June 1, 1987, which recognized his claim for fees to be $298,000, and which was also executed by Mr. Schwartzbach. R.App. 16a-18a.

STATEMENT OF THE CASE

Gant Redmon was appointed trustee of the debtor corporations on October 20, 1985, approximately nineteen months after Yves Courbois caused the corporations to file petitions in bankruptcy. On November 19, 1985, the bankruptcy court also approved Mr. Redmon to act as attorney for the debtor corporations.

Prior to Mr. Redmon's appointment, Courbois failed to pay taxes, including employee withholding taxes; Courbois failed to file tax returns; and he failed to maintain adequate books and records. Furthermore, Courbois had plunged the debtor corporations into debilitating post-bankruptcy litigation. In fact, practically every facet of the bankruptcy was hotly litigated: more than $300,000 in administrative claims to attorneys and accountants had been accumulated, with no apparent end in sight; Courbois had changed lawyers three times; he had sued his first lawyer for fraud; his 50% shareholder Clare Smith, who had contracted to pay Courbois approximately $600,000 for the 50% interest five years before, was claiming $1,500,000 in damages; and the operations of the businesses were teetering on disaster. Furthermore, charges of industrial espionage abounded, equipment was damaged and falling into disrepair from lack of maintenance, and taxes were not being paid.

Through the efforts of Mr. Redmon, a counterclaim was mounted against Clare Smith resulting ultimately in the withdrawal of all her claims against Courbois and the debtor corporations; books were reconstructed; many tax returns for both pre-trustee periods as well as current periods were filed; litigation surrounding the debtors was brought under control, stemming the drain of financial and personnel resources; and plans prepared in cooperation with Courbois had been approved. As Courbois' own exhibits demonstrated in the record below, sales in the final post-trustee years were significantly higher than those in the immediately preceding, pre-trustee year. The businesses were doing in excess of $3,000,000 in sales annually and, for the first time, the corporations were made operationally viable. Indeed, the improvements due to Mr. Redmon's involvement was so dramatic that the bankruptcy judge having day-to-day supervision over the debtor corporations characterized Mr. Redmon's performance as "outstanding" and the debtors' improvement to be a "remarkable turnaround." R.App. 3a.

After having served as trustee for over eight months and after having his law firm serve the debtors as attorney for approximately seven months, Mr. Redmon filed his first application for interim attorney's fees on June 27, 1986. He filed his first application for approval of partial, interim trustee's fees on July 14, 1986. Courbois filed his opposition to those applications on September 10, 1986 wherein he requested a hearing. In that objection, Courbois made no specific allegations, seeking only an opportunity to present objections at a hearing.

As was demonstrated to the courts below, however, Courbois never made more than unsubstantiated, frivolous claims regarding Mr. Redmon's applications, despite every opportunity provided. Furthermore, contrary to the Courbois claim that the "bankruptcy court approved the first interim request without a hearing," Petition at p. 4, the bankruptcy court actually did provide an oppor-

tunity for an oral hearing and, when that opportunity was ignored, it conducted a paper hearing.

The record below demonstrates that on September 23, 1986 the bankruptcy court did hold an oral hearing wherein it considered, *inter alia*, the question of fees. The record also shows that Courbois presented no evidence at that time. R.App. 11a. Furthermore, the court granted Courbois permission to file further, supplemental objections by October 3, 1987. *Id.*

On October 10, 1986 Courbois filed and served his supplemental objections, which were unsubstantiated by affidavit or documentary evidence. Neither Courbois nor his attorney complained of any lack of opportunity to obtain evidence, examine witnesses or contest the information supplied by Mr. Redmon. They acquiesced to a "paper hearing" after failing to mount an evidentiary presentation on September 23, 1986.

On November 24, 1986, after reviewing all of the objections, including Courbois' out of time filing, the bankruptcy court granted interim trustee fees and stated as follows: "[T]he Court has considered the objections to the applications that have been filed . . . the relief requested herein is appropriate." R.App. 11a. A similar order issued that same date awarding interim attorney's fees.

Courbois then filed a motion for reconsideration of the foregoing orders and brought the court's attention to one of the very same issues presented in this appeal, *viz*, that "substantial amounts of post-petition debt to the Internal Revenue Service, incurred during the period of the trustee's tenure, are presently outstanding." [1] Just as in this

---

[1] Unstated by the petitioner in his papers is the fact that due to the chaotic pre-trustee tenure by Courbois, the actual amount of the IRS debt was in question and was subject to negotiation with the Service.

petition, he also complained that no hearing had been held concerning the fees.

The bankruptcy court denied that request for reconsideration stating, in relevant part:

> Courbois complains that no court hearing was held before the Court entered its Order. However:
>
> (1) The Court has fully considered and taken into account the written objections raised by Courbois and others in making its decision as to the proper amount to be paid as interim compensation to the Trustee and his attorneys.
>
> (2) At a duly scheduled hearing in these cases held on September 23, 1986 this Court indicated its intention to rule on the papers, without a hearing, and to grant Courbois ten days within which to file more specific written objections. Courbois' counsel was present at that hearing and, as far as the undersigned Judge can recall, raised no objection to this procedure. The Court on October 28, 1986 issued a written order in accordance with this ruling, and Courbois on October 10, 1986 filed a supplemental memorandum in accordance with this ruling. That supplemental memorandum contains no objection to the procedure specified by the Court. Hence, Courbois has waived any right he may have had to a court hearing.
>
> (3) Section 102(1) of the Bankruptcy Code provides that "after notice and a hearing . . . means after . . . such opportunity for a hearing as is appropriate in the particular circumstances. . . ." Here, Courbois had an opportunity for a hearing on September 23, 1986 but did not take advantage of it. Instead, he agreed through counsel, to the arrangement suggested by the Court for decision on the papers without a hearing.

R.App. 10a-11a.

Notwithstanding the interim nature of the award, and in keeping with his relentless efforts at raising meritless arguments in order to needlessly multiply the proceedings, Courbois' counsel filed a Motion for Leave to Appeal that order, as well as a Notice of Appeal. Both the motion and appeal were denied.[2]

On May 1, 1987, the respondent, Gant Redmon, the debtors' counsel, Brian R. Seeber, together with Courbois' counsel herein all signed and submitted the Amended Disclosure Statements, the Amended Plans of Reorganization, and the proposed Orders of Confirmation for each of the debtor corporations. As is well known by petitioner's counsel, Courbois and his counsel had every opportunity to satisfy themselves as to the facts before signing. In fact, because Courbois continued to work on site as president and because he was in close daily communication with the trustee's manager, Courbois and his counsel had every opportunity to investigate, verify and participate in the formulation of the disclosure statements which his counsel signed.[3]

On May 26, 1987, the respondent, Gant Redmon, filed a final application for approval of trustee and attorney fees and costs. Docket Nos. 370-371.[4]

---

[2] This Court should note that Courbois opposed each and every one of Mr. Redmon's otner interim applications; filed a motion to remove the trustee; filed a motion to terminate the trustee's appointment; and has taken every step possible, including suing Mr. Redmon in an adversarial proceeding for over $1 million, to so multiply the proceedings as to win his fee dispute through attrition. The Court should also note that Mr. Schwartzbach's fee was up to over $33,000 by March of 1988. R.App. 15a.

[3] Unbeknownst to the trustee, Courbois had lured the trustee's manager into partnership on separate business ventures and thereby obtained improper influence over him. Courbios has now sued that manager in federal district court for claims arising out of those business ventures.

[4] Docket No. refers to the docket numbers reflected on the Bankrutcy Court Record in the underlying bankruptcy proceeding. It is not reproduced in the respondent's appendix because of its length.

On June 1, 1987, the Bankruptcy Court entered the Orders of Confirmation for each of the amended plans which also relieved Mr. Redmon of his duties as trustee in all three matters. See Order of Confirmation of Amended Plan of Reorganization, *In re: Le Papillon*, No. 84-158, R.App. 16a-18a. The plans recognized the claim to be $298,000. R.App. 17a.

On or about July 20, 1987, over six months after Courbois regained *de facto* control of the debtor corporations by virtue of the settlement and dismissal of the adversarial proceeding against Clare Smith, and over a month and a half after Courbois obtained *de jure* control by virtue of the trustee's discharge, Courbois filed his opposition to Mr. Redmon's final application for counsel fees and costs, wherein he reserved "the right to make specific objections to individual claims for time and for expenses . . . at the time of the hearing to be set by the Court." Docket No. 384. In addition, on or about July 17, 1987, Brian R. Seeber, ostensibly counsel for the debtor corporations, also filed an opposition on behalf of Courbois regarding the payment of "administrative expenses" wherein the request for a hearing was reiterated. Neither of Courbois' objections and requests for a hearing made any specific substantiated claim regarding Mr. Redmon's application. Finally, the United States also filed an opposition on or about July 22, 1987. Most of the issues raised by Courbois in this appeal and the appeals below were raised by those oppositions. Furthermore, each and every issue raised was a known uncertainty more easily investigated by Courbois, especially during the post-trustee period, than by Mr. Redmon.[5] Even while Mr. Redmon still served as trustee, Courbois had estab-

[5] Needless to say, allegations of misconduct are and were disputed by Mr. Redmon. Mr. Redmon acted consistent with the best interests of every party to this case. Indeed, as Mr. Redmon was prepared to prove at the evidentiary hearing, he acted in true fiduciary style, by elevating the interests of his principals above his own.

lished a close relationship with Mr. Redmon's manager by way of secret business dealings.

On August 18, 1987, the lower Court scheduled a hearing on Courbois' opposition to Mr. Redmon's application for September 8, 1987. R.App. 12a.

Courbois was free at that time and on September 10, 1987 to conduct whatever evidentiary presentation he desired and Mr. Redmon at that time came fully prepared for an evidentiary hearing.

As demonstrated below by the transcript of that hearing, which commenced on September 8, 1987, and which was concluded on September 10, 1987, there was a full ventilation of the factual issues now being raised in this appeal. At the September 10, 1987 hearing, which took place over three months after Courbois had assumed full operational and legal control over the debtors-in-possession, Courbois and his counsel agreed to a settlement of Mr. Redmon's fee application. Instead of the approximate $261,000 in fees and costs applied for, they, together with counsel for the debtor corporations, counsel for the government and Mr. Redmon, agreed to $157,000 in counsel fees and costs. See colloquy reproduced in Judge Oberdorfer's Order at pages 3-5. App. 7a-9a.

It was also during the September 10, 1987 hearing that the reasonableness of Mr. Redmon's fee was addressed. The bankruptcy judge who had supervised the case for, literally, years stated:

> And I have to say also I think Mr. Redmon has, notwithstanding the problems that have arisen, I have previously stated that, and I will repeat, that I think he has done an outstanding job in terms of the results achieved.
>
> * * * *

> [I]t seems to me that before the trustee came in the case things were going apart real fast. . . .
>
> * * * *
>
> But it seems to me that there has been a remarkable turnaround.

R.App. 3a.

Notwithstanding the agreement, counsel for Courbois would not sign the agreed order even though all other counsel did. App. 13a. Claiming post settlement revelations in a letter to the judge, counsel for Courbois sought to renege on the settlement agreement. All of the issues raised below and in this forum were raised in that letter. Later, Mr. Schwartzbach sought to stay the order awarding fees citing those same revelations.

The bankruptcy judge rejected Mr. Schwartzbach's attempt, finding that the post-settlement revelations were known uncertainties at the time of settlement:

> Courbois and his attorney both having expressly consented in open court to the compromise settlement of the fee dispute that is reflected in this Court's Order that Courbois appeals from, and both having been present in Court throughout a full discussion concerning uncertainties as to the extent of the Debtors' post trusteeship tax liabilities . . . the motion for stay pending appeal . . . is denied.

R.App. 1a.

Thereafter, in contemporaneous actions, Mr. Schwartzbach sued Mr. Redmon in an adversarial proceeding, filed a petition for an accounting in the bankruptcy dockets, and filed an appeal of the fee award in the district court below.

This Court should take note of his Honor Chief Judge Aubrey Robinson's analysis of Mr. Schwartzbach's tactics:

> BY THE COURT: I know exactly what's going on here, and I've been through the file. I know what's happening in here.

> We'll tell him anything, but we're going to—when we get all through, then we're going to turn around and sue him because he's got an insurance company. . . .
>
> * * * *
>
> You don't have to give any relief when you stand up representing clients in a court and make a representation to a judge. That record is as good as any release that can ever be written by anybody. You know it and I know it.
>
> * * * *
>
> The record speaks for itself, Mr. Schwartzbach, and I've read every word of that record, every word of it.

R.App. 7a.

Mr. Schwartzbach's adversarial proceeding in the bankruptcy court alleged the exact same issues as on appeal here. Mr. Redmon counterclaimed and filed a motion for summary judgment, together with a supporting affidavit and relevant documents. Courbois failed to create a disputed issue of material fact and his Honor Chief Judge Aubrey Robinson, sitting as a bankruptcy judge, granted Mr. Redmon's Motion for Summary Judgment thereby dismissing Courbois' claims. Mr. Redmon's counterclaims are still pending in that adversarial proceeding.

The appeal of the fee award to the District Court was exhaustively briefed. Unlike Courbois' appeal brief, which made allegations unsupported by the record, Mr. Redmon's brief was fully supported by reference to an appendix drawn from the voluminous record before the bankruptcy court.

After reviewing the record and the appropriateness of the fee, his Honor Louis F. Oberdorfer, United States District Judge, found, as a matter of fact:

> [Courbois'] claim that events subsequent to the settlement justified reneging on it are completely without merit.
>
> * * * *

> [T]he appeal is without merit and [Courbois] may well have abused the process of the Bankruptcy Court.

App. 10a.

Courbois did not stop there, however. He filed an appeal with the District of Columbia Circuit wherein that court summarily affirmed the district court and awarded attorneys fees and costs. His petition for rehearing and petition for rehearing en banc were also denied.

This petition for certiorari followed.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE BANKRUPTCY COURT DID CONSIDER THE REASONABLENESS OF THE FEE

There can be no question but that the award of Mr. Redmon's fee came after a hearing on the record which provided a full ventilation of the factual issues. Mr. Redmon had submitted his applications complete with time sheets, expense reports and calculations. The other parties had submitted their oppositions. The hearings on the application and objections began on September 8, 1987 and were concluded on September 10, 1987. There can be no question but that Courbois and his attorney had a full opportunity to investigate and prepare an evidentiary presentation for those hearings inasmuch as Courbois had been returned to full possession and legal control of the debtor corporations approximately three months before. Furthermore, there can be no question that the bankruptcy court made an independent determination of the value of Mr. Redmon's services and found them to be "outstanding" and responsible for the "remarkable turnaround" experienced by the debtors.[6]

---

[6] The unique perspective of the bankruptcy court judge having had oversight responsibility cannot be disregarded. "Bankruptcy

Courbois' claim that the courts below failed to make an independent determination of the reasonableness of the fee award is a strawman having no basis in the factual record of these proceedings.

A. Where Settlement Negotiations Take Place, The Appropriate Standard Is To Determine Whether The Outcome Fell Within The Reasonable Range Of Litigation Possibilities

Where settlement negotiations have taken place the true standard to apply is to determine whether the outcome fell within the reasonable range of litigation possibilities. In a case analogous to this one, the Second Circuit upheld a compromise plan of reorganization stating:

> The courts generally favor compromise as compromises are "a normal part of process of reorganization." *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 130, 60 S.Ct. 1, 14, 84 L.Ed. 110 (1939). The Supreme Court has noted that "[i]n administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts." *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968) ("TMT").
>
> * * * *
>
> The appellee's position is the correct one. "The very purpose of a compromise to avoid determination of sharply contested and dubious issues." *Connecticut Railway & Lighting Co. v. New York, N.H. & H.R.R.*, 190 F.2d 305, 307 (2d Cir. 1951). The test to be applied where there is a judicial review of a consensual plan of reorganization is whether or not the terms of the proposed compromise fall within the reasonable range of litigation possibilities. See TMT,

---

judges may be the only individuals involved in a bankruptcy with an overall view of the case." Matter of Baldwin-United Corp., 79 B.R. 321, 324 fn. 1 (Bnkcy. S.D. Ohio 1987).

supra, 390 U.S. at 424-425, 88 S.Ct. at 1163; *In re Penn Central Transportation Co.*, 596 F.2d 1102, 1114 (3rd Cir. 1979); *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960); *In re California Associated Products Co.*, 183 F.2d 946, 949-50 (9th Cir. 1950); *In re Equity Funding Corp.*, 416 F.Supp. 132, 145 (C.D.Cal. 1975).

In re New York, New Hampshire and Hartford Railroad Company, 632 F.2d 955, 959-60 (2d Cir. 1980).

By definition, the reasonable range of litigation possibilities with respect to compensation for Mr. Redmon as trustee included the maximum allowable under statute. As the record demonstrates by way of counsels' signatures on the agreed Order Of Confirmation Of Amended Plan Of Reorganization, R.App. 16a-18a, the parties acknowledged Mr. Redmon's statutory, maximum claim to be $298,000. The compromise lowered the fee by over $100,000. Thus, the compromised fee, *ipso facto* fell within the reasonable range of litigation possibilities.

Thus, while the proposition relied upon by Courbois, that the bankruptcy court has an independent duty to determine the reasonableness of the fee award is true, the assertion that the reasonableness of the fee was not tested is false.

II. THE DISTRICT OF COLUMBIA CIRCUIT, LIKE EVERY OTHER CIRCUIT, RECOGNIZES THE NEED FOR AN INDEPENDENT REVIEW OF BANKRUPTCY FEE AWARDS

This Court need not grant certiorari in order to instruct the District of Columbia Circuit on the law regarding bankruptcy fee awards. The bankruptcy court for the District of Columbia has been applying the same standard as applied by all of the other courts for a very long time.

His Honor Chief Judge Aubrey Robinson has recognized the *Johnson v. Georgia Highway Express, Inc.*

standard since at least 1981. In appropriate circumstances the District Court for the District of Columbia has not hesitated to require substantive, *de novo* re-examinations when appropriate:

> On remand, this Court directed the Bankruptcy Court to conduct a more thorough and detailed substantive examination of the fees requested in relation to the value of the services performed. In doing so, the Court specifically suggested that section 330.05 of Collier on Bankruptcy be consulted for guidance . . . *In Re: Devers*, 12 B.R. [140] at 142 [Bkrtcy. D.C. 1981]. The criteria set forth in that section are those delineated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (6th Cir. 1974) . . . . The use of these particular criteria has become the established legal standard and practice employed by bankruptcy courts in examining fee awards.

In re Devers, 33 B.R. 793, 797 (D.D.C. 1983).

III. THE COURT- SHOULD AWARD DOUBLE FEES AND COSTS TO COMPENSATE THE RESPONDENT AND TO DETER FURTHER ABUSE

Attacking a settlement without just cause is a serious matter. Besmirching the character of a member of the Bar and officer of this Court, who through honest and skillful endeavor, was responsible for the "remarkable turn around" experienced by the debtors, is reprehensible.

In *Bernstein v. Brenner*, 320 F.Supp. 1080 (D.D.C. 1970), the District of Columbia Circuit saw through and punished the unscrupulous methods which mirror so closely those employed by Courbois and Schwartzbach in these proceedings. While in *Bernstein* "the complaint was amended three times to reflect altered theories of action or other developments," in this case Schwartzbach has made repeated claims against Mr. Redmon's integrity which he has repeatedly failed to substantiate. He made them simultaneously in three places, the complaint in the

adversary proceeding, the appeal, and the petition for an accounting. Now he appeals after being told by the District Court and the Circuit Court that his appeal was meritless. In *Bernstein* the Court recognized that the case could have been presented "at the outset without the wearing, time-consuming, expensive pretrial activity which is so graphically shown by the jacket in [the] case." *Id.* One need only review the Bankruptcy Court's 38 pages of docket sheets with its 422 entries, so many of which are Schwartzbach's, to appreciate the similarity to *Bernstein*. Indeed His Honor Judge Robinson recognized these tactics as an abuse and a waste of judicial time. On April 6, 1988, Chief Judge Aubrey Robinson took issue with Mr. Schwartzach's tactics:

> MR. SCHWARTZBACK: What Your Honor is addressing is the case that's on appeal, not the case that's in the complaint.
>
> THE COURT: This is—I know how you split it up, Mr. Schwartzback, and it's good lawyering. You can call it good lawyering. I don't think it's good lawyering 'cause I think *you're wasting judicial time.* But I can't enjoin you from filing lawsuits. I know exactly what's gone on here, and I've been through the file. *I know what's happening in here.*
>
> We'll tell him anything, but we're going to—when we get all through, then we're going to turn around and sue him because he's got an insurance company. Then we're going to reopen all the stuff that we've been complaining about, about double-dipping, et cetera, et cetera, et cetera. *Well, that doesn't wash. You know that doesn't wash. It won't wash with me. That's the way you set it up.*

R.App. 6a-7a (emphasis added).

The *Bernstein* court recognized that "it is common experience that charges of mismanagement and fraud against fiduciaries will speedily blast the best reputations, and it is also common experience that once destroyed they

may not easily be restored. . . The same might be said for charges of fraud and breach of fiduciary obligation against an attorney." *Id.* Indeed, the same thing can be said in this case with respect to an attorney who has acted as trustee.

In virtually indistinguishable circumstances the District of Columbia Circuit, on its own motion, ordered an appellant to "pay the costs and counsel fees reasonably incurred by appellees in responding to an appeal that fully warrants the characterization frivolous." *American Security Van Lines, Inc. v. Gallagher*, 782 F.2d 1056 (D.C. Cir. 1986). In the *American Security Van Lines* case the appellant, an attorney, dishonored an agreement settling an action. Just as in this case, the court below characterized the attacks on the settlement as "meritless." Just as in this case, appellant relied upon *Autera v. Robinson*, 419 F.2d 1197 (D.C. Cir. 1949), a precedent which Judge Robinson found completely inapplicable. ("That's not this case by any stretch of the imagination". R.App. 8a.) Just as in this case, the actions taken by appellant have unconscionably delayed secure receipt of the periodic payments "bargained for" and has "multipl[ied] the proceedings unreasonably and vexatiously."

In this case, however, there is an additional aggravating circumstance. The court below not only characterized the appeal as "meritless," it specifically incorporated the *American Security Van Lines* case as support for the action it took. Thus, enhanced sanctions are warranted in this appeal.

This has truly been an abuse of the Court's process. In April of 1988, Schwartzbach represented to His Honor Judge Robinson: "Oh everybody's getting paid, Your Honor, everybody but Mr. Redmon." R.App. 9a. Yet the petitioner has defeated Mr. Redmon's right to his already negotiated fee by forcing him to litigate and re-

litigate each step of the way. Absent sanctions, Courbois and Schwartzbach will have, with impunity, made a mockery of the order awarding fees.

CONCLUSION

WHEREFORE, for the foregoing reasons, the respondent Gant Redmon, respectfully requests that the petition for certiorari be denied and that double attorneys fees and costs be awarded against Courbois and his counsel jointly and severally.

Respectfully submitted,

W. STEVEN PALEOS *
REDMON LAW OFFICES
510 King Street
Suite 301
Alexandria, VA 22314
(703) 549-4800
Counsel for Respondent

* Counsel of Record

August 28, 1989

APPENDIX

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APPENDIX

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 84-00158

IN RE: LE PAPILLON, INC.
d/b/a AU PIED DE COCHON

Case No. 84-00159

YVES & PAUL, INC.
d/b/a AUX FRUITS DE MER

Case No. 84-00160

AU CROISSANT, INC.
d/b/a AU CROISSANT CHAUD

ORDER

[Filed Dec. 22, 1987]

This cause having come before the Court on the motion of Yves Courbois for a stay pending appeal of this Court's order of December 2, 1987, approving payment of fees to the trustee and his attorneys, and Courbois and his attorney both having expressly consented in open court to the compromise settlement of the fee dispute that is reflected in this Court's Order that Courbois now appeals from, and both having been present in court throughout a full discussion concerning uncertainties as to the extent of the Debtors' post-trusteeship tax liabilities, it is

ORDERED, that the motion for stay pending appeal be, and hereby is, DENIED.

Dated: December 21, 1987.

/s/ Geo. Bason, Jr.
GEORGE FRANCIS BASON, JR.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF:

84-00158 LE PAPILLON, INC.
84-00159 YVES & PAUL, INC.
84-00160 AU CROISANT, INC.

[Filed Feb. —, 1988]

Thursday, September 10, 1987
Washington, D.C.

The proceedings in the above-captioned matter came on before the HONORABLE GEORGE FRANCIS BASON, JR., United States Bankruptcy Court Judge, commencing at 4:00 p.m.

APPEARANCES:

On Behalf of the Debtor Corporation
BRIAN S. SEEBER, Attorney-at-law

On Behalf of the Former Trustee
GANT REDMON, Attorney-at-law

On Behalf of the IRS
ROBERT GORDON, Attorney-at-law

On Behalf of Mr. Corboi
SAUL SCHWARTZBACK, Attorney-at-law

* * * *

[3] THE COURT: And I have to say also I think Mr. Redmon has, notwithstanding the problems that have arisen, I have previously stated that, and I will repeat, that I think he has done an outstanding job in terms of the results achieved.

Now, there may be other problems since there are some other problems but so far as benefit to these three estates, it seems to me that before the trustee came in the case things were going apart real fast and whether it was because of the Russian defector or something else. In other words, it may have been nothing to do with Mr. Redmon but I'm prepared to give him the benefit of the doubt until I hear something else.

But it seems to me that there has been a remarkable turn around. Be that as it may, I hope that there will be a spirit of accommodation among counsel and I recognize * * *

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Bankruptcy Case No. 88-0003

UNITED STATES OF AMERICA

v.

REDMON, *et al.*,
Defendants.

[Filed April 19, 1988]

Washington, D.C.
April 6, 1988

The above-entitled matter came on for hearing before the Honorable AUBREY E. ROBINSON, JR., Bankruptcy Judge, United States District Court, at 1:45 p.m.

APPEARANCES:

SOL SCHWARTZBACK, ESQ.
For the Government

W. STEVEN PALEOS, ESQ.
For the Defendants

* * * *

[13] I'd like to hand up to Your Honor a copy of the September 10th hearing. That's where Your Honor will find what counsel wants to call an agreement, but which the record clearly reflects was no more than a withdrawal of objections and leading—

THE COURT: That's not so.

MR. SCHWARTZBACK: I can read to Your Honor—

THE COURT: I have read the whole transcript for those two matters. That's not so.

MR. SCHWARTZBACK: Your Honor pleases—

THE COURT: I'll hear you out, but that's not so.

MR. SCHWARTZBACK: May I refer to those portions of the record?

THE COURT: Yes.

MR. SCHWARTZBACK: On page 10 of the September hearing, the fifth line by the Court:

> "Now, what about the question of bounced checks and all those things that were raised in a couple days ago? Is there still a live controversy, or is that something that the Court should—"

Stops.

And Mr. Redman: "Your Honor," and he goes ahead on line 11, "I don't know what the resolution of that issue is."

THE COURT: That's a separate and distinct matter, [14] and that's not the agreement that we're talking about. That's the matter that involves Internal Revenue. That is not covered in this.

MR. SCHWARTZBACK: If Your Honor pleases—

THE COURT: That is strictly to do with the argument that was ongoing about the bank—about the bounced checks and about the post-petition non-payment of monies that the Government—

MR. SCHWARTZBACK: Exactly.

THE COURT: But that's not the agreement we're talking about.

MR. SCHWARTZBACK: That's correct.

THE COURT: All right.

MR. SCHWARTZBACK: Nor will you find in the file an agreement by Mr. Courbois, or by any of the corporations, to do anything other than to withdraw its objection—

THE COURT: To what?

MR. SCHWARTZBACK: —to the amount of fee.

THE COURT: Yes.

MR. SCHWARTZBACK: That's all, the amount of fee.

THE COURT: I understand that.

MR. SCHWARTZBACK: All right. Then the complaint—if Your Honor understands that, when the complaint is in six counts.

THE COURT: I read the complaint. I have the [15] docket before me, the record that's on appeal. I've read it all.

MR. SCHWARTZBACK: And none of those counts have anything to do with the payment fee.

THE COURT: I understand that.

MR. SCHWARTZBACK: Now, if Your Honor pleases, the only agreement that was made was a withdrawal of an objection to fee. In the complaint—

THE COURT: I'm going to agree to pay you $100,000 attorneys fees and trusteee fees as a final of all I owe you, and I reserve the right to come back and sue you because you're not entitled to any of it because you didn't do anything right. That's what you're trying to tell me.

MR. SCHWARTZBACK: No, Your Honor, I'm not.

THE COURT: That's exactly what you've done.

MR. SCHWARTZBACK: No, Your Honor, that's not what I've done.

THE COURT: That's exactly what you've done.

MR. SCHWARTZBACK: What Your Honor is addressing is the case that's on appeal, not the case that's in the complaint.

THE COURT: This is—I know how you split it up, Mr. Schwartzback, and it's good lawyering. You can call

it good lawyering. I don't think it's good lawyering 'cause I think you're wasting judicial time. But I can't enjoin you [16] from filing lawsuits. I know exactly what's gone on here, and I've been through the file. I know what's happening in here.

We'll tell him anything, but we're going to—when we get all through, then we're going to turn around and sue him because he's got an insurance company. Then we're going to reopen all the stuff that we've been complaining about, about double-dipping, et cetera, et cetera, et cetera. Well, that doesn't wash. You know that doesn't wash. It won't wash with me. That's the way you set it up.

MR. SCHWARTZBACK: Your Honor is the judge here—

THE COURT: That's right.

MR. SCHWARTZBACK: There's nothing—

THE COURT: I know, I know.

MR. SCHWARTZBACK: There's nothing in the record, Your Honor, that—where we gave any release—that we relieved Mr. Redmon of any liability—

THE COURT: You don't have to give any relief when you stand up representing clients in a court and make a representation to a Judge. That record is as good as any release that can ever be written by anybody. You know it and I know it.

MR. SCHWARTZBACK: Absolutely, and I never made such a representation to any Judge that I released Mr. Redmon on behalf of Mr. Courbois—

[17] THE COURT: I'm telling you you didn't have to release because the record speaks for itself. The record speaks for itself, Mr. Schwartzback, and I've read every word of that record, every word of it.

MR. SCHWARTZBACK: May I point out to Your Honor certain cases that have been cited by counsel? One of them is the *Autera v. Robinson* case found in 419 F.2d 1197.

THE COURT: Well, I've read your quotations from that case, and it has no application to this because the reason the Judge—Robinson remanded that case is that there was a clear question as to the capability of the woman to enter into any agreement because of her physical condition. And he said under those circumstances, he sent it back and he said, I want a factual record made as to what her physical condition was, not whether or not there was an agreement. That was the *Autera* case.

MR. SCHWARTZBACK: And that's correct, Your Honor.

THE COURT: That's not this case.

MR. SCHWARTZBACK: Your Honor, this case—

THE COURT: That's not this case by no stretch of your imagination, Mr. Schwartzback. That's not this case. There's no contention here that somebody was non-compus or was whatever. That's not this case.

MR. SCHWARTZBACK: Your Honor pleases, in this case—

* * * *

[24] THE COURT: All right.

MR. SCHWARTZBACK: I agree with both of—

THE COURT: Yes.

MR. SCHWARTZBACK: I agree with both of your statements, Your Honor, that the fee was settled on that date—

THE COURT: That's exactly right.

MR. SCHWARTZBACK: —and that Internal Revenue was not settled on that date, but nor settled on that date were the allegations contained in our complaint.

THE COURT: I'll bet you they were.

MR. SCHWARTZBACK: Well, there's nothing in the record to indicate it.

THE COURT: Oh, yes there is to. You'll see it. If you don't see it now, you will, eventually. Meanwhile, nobody's getting anything.

MR. SCHWARTZBACK: Oh, everybody's getting paid, Your Honor, everybody but Mr. Redmon. Every creditor and the Internal Revenue—

THE COURT: Well then, what's the Government—is the Government satisfied with the way it's being paid?

MR. SCHWARTZBACK: Mr. Gordon?

MR. GORDON: Your Honor, as far as the current 11—the current payments are being made. In fact, Your Honor,—looking at the record that we had opposed the Motion to * * *

* * * *

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 84-00158
(Chapter 11)

IN RE LE PAPILLON, INC.
d/b/a AU PIED DE COCHON

Case No. 84-00159
(Chapter 11)

YVES AND PAUL, INC.
d/b/a AU FRUIT DE MER

Case No. 80-00160
(Chapter 11)

AU CROISSANT, INC.
d/b/a AU CROISSANT CHAUD

ORDER

[Filed Feb. 20, 1987]

Before the Court is a motion filed by the corporate debtors' principal Yves Courbois ("Courbois") for reconsideration of this Court's Order entered November 26, 1986 authorizing payment of interim fees to the Trustee and the Trustee's attorneys, together with the Trustee's opposition. Courbois complains that no court hearing was held before the Court entered its Order. However:

(1) The Court has fully considered and taken into account the written objections raised by Courbois and others in making its decision as to the proper amount to

be paid as interim compensation to the Trustee and his attorneys.

(2) At a duly scheduled hearing in these cases held on September 23, 1986 this Court indicated its intention to rule on the papers, without a hearing, and to grant Courbois ten days within which to file more specific written objections. Courbois' counsel was present at that hearing and, as far as the undersigned Judge can recall, raised no objection to this procedure. The Court on October 28, 1986 issued a written order in accordance with this ruling, and Courbois on October 10, 1986 filed a supplemental memorandum in accordance with this ruling. That supplemental memorandum contains no objection to the procedure specified by the Court. Hence, Courbois has waived any right he may have had to start a court hearing.

(3) Section 102(1) of the Bankruptcy Code provides that "'after notice and a hearing' . . . means after . . . such opportunity for a hearing as is appropriate in the particular circumstances. . . ." Here, Courbois had an opportunity for a hearing on September 23, 1986 but did not take advantage of it. Instead, he agreed through counsel to the arrangement suggested by the Court for decision on the papers without a hearing. Moreover, since the Court has simply made an interim award, Courbois will have ample oppoprtunity later, when the Trustee's final application comes before the Court, to raise whatever objections he deems appropriate.

NOW THEREFORE IT IS ORDERED that Courbois' motion for reconsideration is denied.

Dated: February 18, 1987.

/s/ Geo. Bason, Jr.
GEORGE FRANCIS BASON, JR.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 84-00158

IN RE: LE PAPILLON, INC.
d/b/a AU PIED DE COCHON

Case No. 84-00159

YVES & PAUL, INC.
d/b/a AUX FRUITS DE MER

Case No. 84-00160

AU CROISSANT, INC.
d/b/a AU CROISSANT CHAUD,
Debtors.

ORDER

[Filed August 18, 1987]

Upon consideration of the motion by GANT REDMON for a continuance of the hearing on the former Trustee's Application for Approval of Payment of Counsel Fees and Costs and Trustee's Fees and objections filed thereto by Yves Courbois, the debtor corporations, and the Internal Revenue Service, and it appearing that good cause has been shown therefor and that the Motion should be granted, it is

ORDERED that the above-described hearing be, and it hereby is, continued to September 8, 1987, at 11:00 o'clock a.m.

/s/ Geo. Bason, Jr.
GEORGE FRANCIS BASON, JR.
United States Bankruptcy Judge

Dated: August 10, 1987.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Bankruptcy Case No. 84-158

IN RE: LE PAPILLON,

Debtor.

Bankruptcy Case No. 84-159

IN RE: YVES & PAUL,

Debtor.

Bankruptcy Case No. 84-160

IN RE: AU CROISSANT,

Debtor.

Washington, D.C.
Tuesday, September 8, 1987

The above-entitled matter came on for hearing before the Honorable George Francis Bason, Jr., United States Bankruptcy Judge for the District of Columbia, in courtroom number twenty-two.

APPEARANCE OF COUNSEL:

On Behalf of the Debtor Corporation:
BRIAN R. SEEBER, Attorney at Law

On Behalf of the IRS:
ROBERT GORDON, Attorney at Law

On Behalf of the United States Trustee's Office:
DENNIS EARLY, Attorney at Law

The Former Trustee:
GANT REDMON, Attorney at Law
ANN RAY SMITH, Attorney at Law

* * * *

[18] of procedure Mr. Redmon might suggest for dealing with it.

MR. REDMON: Okay. One last try, Your Honor.

THE COURT: Okay.

MR. SEEBER: Your Honor, I spoke with the principal of the debtor here from the courtroom just a few moments before Your Honor came on. I tried to get this to the last moment. I know what should be done, I'm just not able to do it today.

And in the scheme of things, what we're talking about is a relatively insignificant difference. It is a difference which, with Mr. Schwartzback not here, as Your Honor has seen him in court, he can be a useful tool if he is aimed the right way. He certainly has considerably more influence over one of the parties involved than I do. If I had him in hand, I could have accomplished a lot more than I was able to do today by phone.

THE COURT: He will be back tomorrow?

MR. SEEBER: Tomorrow.

THE COURT: If we were to continue this matter until 4 00 o'clock on Thursday, do you think that would help?

MR. REDMON: Yes. I'm certainly available, Your Honor.

MR. SEEBER: I'm available, Your Honor.

MR. GORDON: I'm available, Your Honor.

* * * *

Law Offices
SAUL M. SCHWARTZBACH
Suite 202
4710 Bethesda Avenue
Bethesda, Maryland 20814
301-951-6391

March 2, 1988

Mr. and Mrs. Yves Courbois
8453 Broken Arrow Court
Annandale, Virginia 22003

STATEMENT OF ACCOUNT

FOR PROFESSIONAL SERVICES RENDERED:
For all matters, namely: Chapter XI, Bakery
M Street Lease, Sloan and Redmon

Prior Statement February 5, 1988	$29,502.80
Received nothing on account in February, 1988	
Balance Forward	$29,502.80
Attorney services for February, 1988	
22.75 hours @ $150.00	3,412.50
Support staff services	
2.00 hours @ $50.00	$200.00
TOTAL DUE THIS STATEMENT	$33,115.30

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 84-00158
(Chapter 11)

IN RE: LE PAPILLON, INC.
d/b/a AU PIED DE COCHON,
Debtor

ORDER OF CONFIRMATION OF
AMENDED PLAN OF REORGANIZATION

At WASHINGTON, D.C., this 1st day of June, 1987:

Upon the filing of the Amended Plan of Reorganization dated April 30, 1987 under Chapter 11 of the Bankruptcy Code by the debtor, Le Papillon, Inc. d/b/a Au Pied de Cochon, the Trustee Gant Redmon, and Yves Courbois, President of the debtor, of Washington, a copy of said Amended Plan of Reorganization and Amended Disclosure Statement having been transmitted to the holders of all claims in interest; and upon a hearing and confirmation of said Amended Plan of Reorganization having been held on May 26, 1987; and,

IT HAVING BEEN DETERMINED BY THE COURT AFTER SAID HEARING:

1. That the Plan of Reorganization complies with the applicable provisions of Chapter 11 of the Bankruptcy Code.

2. That the Proponent of the Plan complies with the applicable provisions of Chapter 11 of the Bankruptcy Code.

3. That the Plan has been proposed in good faith and not by any means forbidden by law.

(d) Renner, Kositzka & Wicks: Although this claim was estimated in the amount of Fifteen Thousand Dollars ($15,000.00), the actual claim is now in the approximate amount of Nine Thousand Dollars ($9,000.00), which is to be paid at the rate of One Thousand ($1,000.00) per week beginning June 1, 1987, and continuing on each successive Monday until the claim is paid in full.

(e) Gant Redmon, Trustee herein, has a claim in the approximate amount of Two Hundred Fifty-Four Thousand Dollars ($254,000.00) in stautory Trustee's commissions, and Forty-Four Thousand Dollars ($44,000.00) in attorney's fees. The debtor is directed to forthwith remit the sum of Ten Thousand Dollars ($10,000.00) against heretofore allowed attorney's fees, and the balance of said claim is to be allowed upon Application to the Court and hearing thereon. Upon allowance, the balance of said claim is to be paid pursuant to the Amended Plan.

The above-described claims are also against the debtors in Case Nos. 84-00158 and 84-00159, and the payments herein are the same as those referred to in the Confirmation Orders entered in said cases. The sums described herein represent the total owing, however, and the sums referred to herein represent the total to be paid for all three debtors.

9. The language of the Amended Plan is to be construed to require that the post-petition claim of Internal Revenue Service must be fully satisfied, including all properly charged interest and penalties thereon.

10. That confirmation of the Plan is not likely to be followed by liquidation, or the need for further financial reorganization of the Debtor, or any successor to the Debtor, under the Plan.

Gant Redmon, Trustee, is hereby discharged from office, and his bond is released, and the debtor is returned to

full management, possession and control of its assets as provided in Article XII of the Amended Plan. The Trustee is to remain a party in interest pursuant to 11 U.S.C. § 1109, to bring to the attention of the Court any default of the debtor in the performance of the Amended Plan as confirmed hereby.

NOW THEREFORE, IT IS ORDERED: That the Amended Plan filed by the Debtor on April 30, 1987 is CONFIRMED.

/s/ Geo. Bason, Jr.
GEORGE FRANCIS BASON, JR.
Judge
United States Bankruptcy Court
for the District of Columbia

WE CONSENT TO ENTRY OF THIS ORDER:

/s/ Brian R. Seeber
BRIAN R. SEEBER — Counsel for Debtor
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(202) 785-9223

/s/ Gant Redmon
GANT REDMON — Trustee
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/s/ Saul Schwartzbach
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